

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PATRICIA L. CLAXTON
Claimant

VS.

JOHNSON CO. & BOARD OF COMM.
Self-Insured Respondent

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Docket No. **1,019,692**

ORDER

Claimant requested review of the February 2, 2009 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on May 20, 2009.

APPEARANCES

Thomas S. Stein of Kansas City, Missouri, appeared for the claimant. Eric T. Lanham of Kansas City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board, the parties requested, in the event the Board found claimant sustained a compensable injury, that the Board decide all of the remaining issues rather than remand the claim to the Administrative Law Judge.

ISSUES

The Administrative Law Judge (ALJ) found claimant failed to sustain her burden of proof that her series of accidents arose out of and in the course of employment and she failed to provide timely written claim for the March 2002 accident.

Claimant requests review of whether she suffered accidental injury arising out of and in the course of employment and whether she gave timely written claim.

Respondent argues the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a juvenile corrections officer for respondent. Her job duties included supervising residents, walking up and down steps, pushing and pulling doors, carrying trash, lifting bedding and temporary beds and doing laundry.

Claimant injured her right shoulder while restraining an inmate in March 2002. She completed an accident report on March 22, 2002, and submitted it to Mr. Aaron Johnson, respondent's shift supervisor. But she did not seek any medical treatment at that time.

On July 28, 2003, claimant sought medical treatment for her right shoulder with Dr. Thomas Samuelson. She complained of pain in her right shoulder but denied any injury. She noted that her symptoms had progressively worsened over the last month. Dr. Samuelson diagnosed right rotator cuff tendinitis. Dr. Samuelson performed a cortisone injection into her right shoulder and advised her to continue taking anti-inflammatory medication. She was told to return to the doctor on an as-needed basis.

On September 15, 2003, claimant returned to Dr. Samuelson for reevaluation of her right shoulder. She told the doctor that she had improvement in her shoulder after the previous cortisone injection but that she had re-injured her right shoulder while riding a Sea Doo jet ski. The doctor noted claimant said her shoulder had been doing good until she aggravated it in the Sea Doo incident. A repeat cortisone injection was administered to claimant's right shoulder and she was directed to continue taking anti-inflammatory medication. Claimant was again told to return on an as-needed basis. Claimant continued to work performing her regular job duties. She did not seek any additional treatment for her right shoulder at that time.

Claimant then described an onset of left neck and shoulder pain while sitting at her desk at work in April 2004. But she did not report that specific incident to her supervisor although she told him that she was having problems with her neck. Interestingly, claimant later told an insurance adjustor that nothing out of the ordinary had occurred and that she was sitting at home when she felt a sharp pain in her neck. And when evaluated by Dr. Michael J. Poppa she provided a history that in April 2004 as she was walking at work she slipped but did not fall and within an hour experienced pain in her neck and bilateral shoulders.

After claimant missed several consecutive days at work in mid-April 2004 her supervisor asked her to provide a doctor's slip excusing her from work. During the conversation claimant told him that her left neck and shoulder condition might be a worker's compensation issue. She then told him it felt like the same kind of injury she had

restraining the inmate in 2002. But an April 20, 2004 e-mail from her supervisor regarding the conversation provided in pertinent part:

OK. Patty was asked for a Dr. note for the last three days she had missed consecutively being 4/14, 15, and 18. She said she has one but will not be able to produce it until Monday 4/26, as that is her next appointment. She then told me it was a workman's comp issue. I asked her what about, and she informed me that she was injured in a restraint that happened in March 2003 with She said she has been working with a pinched nerve in her neck and had been to the Dr. over the last week. I advised her that if she was going to file a workman's comp claim, she needed to get the paperwork done ASAP. She said she was.¹

On April 23, 2004, claimant sought medical treatment with Dr. Mark Balderston, a chiropractor, for her left neck and shoulder pain. But claimant did not mention any work-related injury to Dr. Balderston. She told Dr. Balderston that she was unsure when her symptoms began but she did specifically mention the incident on the Sea-Doo. Claimant received treatment from Dr. Balderston until May 12, 2004.

Claimant testified that as she continued working she continued to have problems with her neck and left shoulder as she was sore most of the time. On June 4, 2004, claimant sought treatment with Dr. Larry F. Frevert. The doctor noted claimant was being evaluated for bilateral shoulder pain, left greater than right and that the left shoulder had been bothersome for several weeks.

On July 9, 2004 claimant's employment with respondent was terminated for disciplinary reasons.

Claimant continued to receive medical treatment from Dr. Frevert who initially provided claimant conservative treatment and then provided steroid injections in each shoulder. In an office note dated August 13, 2004, Dr. Frevert noted that claimant's history on the right shoulder dates back a couple of years when she injured it restraining an inmate. On September 7, 2004, Dr. Frevert operated on claimant's left shoulder and performed an arthroscopy with debridement of the joint, debridement of labral tear, subacromial decompression and distal clavicle excision. On March 29, 2005, Dr. Frevert operated on claimant's right shoulder and performed an arthroscopy with debridement of the joint, debridement of labral tear, subacromial decompression and distal clavicle excision.

In a letter dated March 29, 2006, Dr. Frevert noted that claimant related her right shoulder problems to the March 2002 incident when she restrained an inmate. Dr. Frevert's medical notes do not indicate whether he was aware of the Sea Doo incident.

¹ P.H. Trans., Cl. Ex. 2.

Claimant testified that she filed a written claim for compensation by regular mail in July 2004 to Melinda McKay at the Johnson County Juvenile Detention. The first written claim was never received so claimant filed another one this time by certified mail to Terry Sinclair. Claimant testified that she got a receipt showing that he had received it.

Dr. James A. Stuckmeyer, board certified orthopedic surgeon, examined and evaluated the claimant at her attorney's request. On January 30, 2006, the doctor performed a physical examination and diagnosed claimant as having bilateral impingement syndrome and degenerative tears of the labrum. The doctor opined that claimant's occupational duties throughout her years of employment were a substantial contributing factor to the development of her condition which necessitated the surgical procedures performed.

Based on the AMA *Guides*², Dr. Stuckmeyer opined that claimant had a 20 percent permanent partial disability to each shoulder due to the intraarticular pathology identified with the labral tears and her ongoing complaints. The doctor placed permanent restrictions on claimant of no repetitive overhead utilization of either the right or left arm; no overhead lifting greater than 10-15 pounds on an occasional basis and no sudden jolts or jerks with either arms.

Dr. Michael J. Poppa saw claimant at the request of respondent's attorney on February 19, 2008. The doctor testified:

Q. Okay. I got you. As it pertains to the shoulder surgery that she had in 2004, did you have an opinion as to whether that was causally related to her work in Johnson County?

A. I do have an opinion, yes.

Q. What is that opinion?

A. It's my opinion that Ms. Claxton's recent right shoulder condition, including status-post arthroscopy, with residuals, did not occur during the course and scope of her employment at Johnson County, Kansas. Her employment or her stated work accident did not cause or substantially contribute to her present conditions involving her right upper extremity shoulder and the treatment she subsequently received.

Q. Did you have an opinion as to what was the cause of the right shoulder complaints?

A. Yes.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Q. What was that?

A. It's my opinion that Ms. Claxton's right shoulder condition requiring surgery occurred as a direct and proximate cause of her personal injury which occurred while riding a Sea-Doo, and that was clearly noted in the medical records from Dr. Samuelson on 9/15/03.³

Dr. Poppa noted claimant did not seek medical treatment after the 2002 incident and that any injury she may have suffered in that incident had satisfactorily resolved. The doctor further opined that claimant's left upper extremity and shoulder did not arise out of and in the course of her employment. Dr. Poppa did not place any permanent restrictions on the claimant. Based on the *AMA Guides*, Dr. Poppa rated claimant's right shoulder at 5 percent due to the soft tissue strain involving her right shoulder that had resolved.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁵

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.⁶ Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.⁷ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁸

The claimant alleged an injury to her right shoulder in March 2002 but never sought treatment until over a year later. And when she did seek treatment for her right shoulder in July 2003 she specifically noted that she had not suffered any injury. After an accident while riding a Sea Doo, she returned for treatment for her right shoulder in September

³ Poppa Depo. at 11-12.

⁴ K.S.A. 44-501(a).

⁵ K.S.A. 44-508(g).

⁶ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991), *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258, (1999).

⁸ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

2003 and noted that the accident had aggravated her right shoulder which had improved after the treatment she had received in July.

Claimant next sought chiropractic treatment for her left shoulder and neck in April 2004. She did not mention any work-related injury to the chiropractor and indicated that she was unsure when her symptoms began but she did mention the accident on the Sea-Doo. The failure to mention work is especially significant because she sought chiropractic treatment just a few days after telling her supervisor that her problem might be work-related. And claimant then provided a variety of different versions regarding the onset of her left shoulder and neck pain. As noted, she told the chiropractor she was unsure when her symptoms began, she then told an insurance adjuster that her pain started as she was sitting at home, she testified that her left shoulder and neck pain started while she was sitting at her desk at work, and finally she told Dr. Poppa that her pain started about an hour after a slip and near fall incident.

Dr. Frevert noted the onset of the right shoulder problem started with the initial March 2002 incident. Dr. Poppa attributed the right shoulder problem to the Sea Doo incident. Dr. Stuckmeyer attributed the bilateral shoulder pain to overuse at work. But Dr. Stuckmeyer clearly did not have any idea what claimant's job duties were when he offered that opinion.

The ALJ analyzed the evidence in the following pertinent manner:

The record did not present a credible basis on which to find a repetitive injury to the shoulders. There were too many different stories going on. The right shoulder was first described by the claimant as a specific incident in 2002, then later by her doctor as a repetitive injury from unidentified job tasks, then later, again by the claimant, as the result of a specific incident in 2004. The left shoulder was first attributed to repetitive job tasks that did not sound repetitive, and the injury presented itself while claimant was sitting at a desk. Then the left shoulder was later attributed to a specific incident in 2004.

The only story that seemed credible was the specific injury to the right shoulder that occurred in March, 2002. The claimant at least made a contemporaneous written accident report for that particular injury that was consistent with her initial testimony about the injury. The fact that the claimant did not seek treatment for right shoulder complaints until some 16 months later, at which time she had forgotten about the March, 2002 incident, tends to show that the March 2002 incident was a minor injury that resolved.

The claimant failed to prove by a preponderance of credible evidence that she suffered a repetitive injury to the shoulders arising out of and in the course of employment. The claimant failed to prove that she provided timely written claim for

a March, 2002 injury to the right shoulder. For these reasons, the claimant cannot receive an award of benefits in this case.

The Board agrees and affirms.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 2, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas S. Stein, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge